

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ERIC A. GOTHAN and TERREIA L.
 GOTHAN, husband and wife,

Plaintiffs,

v.

WORLD SAVINGS BANK, FSB; et al.,
 Defendants.

3:10-cv-00066-RCJ-WGC

ORDER

Currently before the Court are Eric and Terreia Gothans' ("Plaintiffs") Motion to Amend their Complaint (#72) and Defendants' Bank of America, N.A.; Countrywide Bank, N.A.; Countrywide Home Loans, Inc.; and ReconTrust Company, N.A. Motion to Dismiss (#65).

The Court heard oral argument on September 27, 2011.

BACKGROUND

I. Facts¹

In April of 1990, Plaintiffs Eric and Terreia Gothan purchased real property located at

¹ Defendants Wells Fargo Bank, N.A.; Countrywide Home Loans, Inc.; ReconTrust Company, N.A.; Countrywide Bank, N.A.; and Bank of America, N.A. filed requests for judicial notice and attached copies of relevant publicly recorded documents. (See Request for Judicial Notice (#66); Request for Judicial Notice (#68)). The Court takes judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 1345 Sunflower Lane, Fernley, Nevada 89408 (the "Property"). (Grant Bargain and Sale Deed
2 (#66) at 7). To finance the purchase, Plaintiffs obtained a \$114,350.00 loan which was
3 secured by the Property. (Deed of Trust (#66) at 14).

4 Plaintiffs refinanced the Property in May 2005 by executing a deed of trust in the
5 amount of \$288,000.00 (Note (#66) at 31; First Deed of Trust (#66) at 35). ("First Deed of
6 Trust"). The lender listed on the First Deed of Trust was Sierra Pacific Mortgage Company,
7 Inc. ("Sierra Pacific"), the trustee was listed as Greenhead Investments, Inc. ("Greenhead"),
8 and Mortgage Electronic Registration System, Inc. ("MERS") was named as beneficiary. (First
9 Deed of Trust (#66) at 35).

10 A second deed of trust was later executed by Plaintiffs in September 2005 to secure
11 a line of credit from Countrywide Bank, N.A. in a maximum amount of \$36,000.00. (Deed of
12 Trust (#68-7) at 2-3). MERS was listed as the beneficiary and ReconTrust Company, N.A.
13 ("ReconTrust") was listed as the Trustee. (*Id.*).

14 By May of 2009, Plaintiffs failed to make payments and defaulted under the First Deed
15 of Trust with Sierra Pacific. (Notice of Default (#68-8) at 2-3). ReconTrust filed a notice of
16 default and election to sell under deed of trust on May 8, 2009 ("NOD"). (*Id.*). On May 11,
17 2009, MERS officially substituted ReconTrust in as trustee, replacing Greenhead (Substitution
18 of Trustee (#68-9) at 2). No foreclosure sale has yet occurred.

19 This lawsuit was then filed and a lis pendens recorded on the property.

20 **II. The Complaint**

21 Plaintiffs filed their original complaint on December 23, 2009 in Nevada state court, but
22 the case was removed to federal court on February 1, 2011. (Petition for Removal (#1)).
23 Plaintiffs' original complaint included claims of: (1) unfair lending practices; (2) conspiracy to
24 commit fraud and conversion; (3) injunctive relief; (4) declaratory relief; (5) wrongful
25 foreclosure; (6) fraud through omission; (7) quiet title; (8) breach of the covenant of good faith;
26 (9) tortious good faith; (10) civil conspiracy; (11) RICO violations; (12) unjust enrichment; and
27 (13) fraud in the inducement. (Compl. (#1-1)). The Complaint listed as defendants: World
28 Savings Bank, FSB; Golden West Savings Association Service Company; Sierra Pacific;

1 Greenhead; MERS; First American Title Company of Nevada; Countrywide Home Loans, Inc.;
2 Service Link; Countrywide Bank, N.A.; Bank of America, N.A.; ReconTrust Company, N.A.;
3 and Cristina Garcia. (*Id.*).

4 On July 2, 2010, this case was transferred to the Judicial Panel of Multi-District
5 Litigation ("JPML"). (Transfer Order (#41)). An order was issued by Judge Tielborg, who
6 presided over the JPML on March 21, 2011, remanding the following claims to this Court:
7 violation of N.R.S. § 598D (count 1); injunctive relief (count 3); declaratory relief (count 4); civil
8 conspiracy (count 10), RICO claims (count 11), and unjust enrichment (count 12). (Mot. to
9 Dismiss (#65) at 5). On April 5, 2011, Defendants Countrywide Home Loans, Inc.;
10 ReconTrust; Bank of America, N.A.; and Countrywide Bank, N.A. (which has since merged into
11 Bank of America, N.A.) (Collectively "Defendants") filed a Motion to Dismiss all claims that had
12 been remanded by the JPML. (See Mot. to Dismiss (#65)).

13 In response to Defendant's Motion to Dismiss, Plaintiffs offered to voluntarily dismiss
14 the claims of civil conspiracy (count 10), RICO violations (count 11), and unjust enrichment
15 (count 12). (Opp'n to Mot. to Dismiss (#69) at 4). The only remaining claims are those for
16 violations of N.R.S. § 598D (count 1); injunctive relief (count 3), and declaratory relief (count
17 4). (*Id.*).

18 On May 7, 2011, Plaintiffs filed a motion for leave to file a first amended complaint
19 ("FAC"), supposedly for the purpose of "clarifying the causes of action [and] identifying the
20 proper defendants." (Mot. to Amend (#72) at 2). The FAC is 68 pages in length makes the
21 following claims: (1) debt collection violations; (2) unfair and deceptive trade practices; (3)
22 unfair lending practices; (4) breach of the covenant of good faith; (5) wrongful foreclosure; (6)
23 quiet title; (7) fraud through inducement and omission; (8) slander of title; and (9) abuse of
24 process. (Am. Compl. (#72-1) at 33-65). Plaintiffs assert that the FAC does not name MERS
25 as a defendant, but state they may add MERS as a defendant if the Court finds that the FAC
26 should be transferred to the JPML panel. (Mot. to Amend (#72) at 2-3).

27 In response, Defendants filed an opposition to the FAC. (Opp'n to Mot. to Amend
28 (#73)). Defendants argue that the FAC fails to satisfy Fed. R. Civ. P. 8 pleading requirements

1 because it is not simple, concise, or direct. (*Id.* at 2). Additionally, Defendants argue that the
 2 FAC continues to re-assert claims involving the formation and operation of MERS which are
 3 outside this Court's jurisdiction because Judge Teilborg has retained those claims. (*Id.* at 3-4).
 4 Defendants further argue that the amended claims are futile. (*Id.* at 4-7). Finally, Defendants
 5 argue that Charlotte Olmos—who is added as a defendant under the FAC—should not be
 6 joined because her involvement with the matters of this case was only as an employee of
 7 American Title Company of Nevada within her scope of employment, and that she is being
 8 fraudulently added to destroy diversity jurisdiction.²

9 LEGAL STANDARD

10 Under Fed. R. of Civ. P. 15, the court should freely give leave to amend when justice
 11 so requires. However, leave to amend need not be granted when the proposed amendment
 12 would be futile or subject to dismissal. *See Forman v. Davis*, 371 U.S. 178, 182 (1962)
 13 (identifying four relevant factors in determining whether a leave to amend pleadings should be
 14 denied: undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the
 15 opposing party); *see also Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (stating
 16 futility as a justification for denying a motion to amend); *Universal Mortg. Co. v. Prudential Ins.*
 17 *Co.*, 799 F.2d 458, 459 (9th Cir. 1986) (same); *Bogor v. Am. Pony Express, Inc.*, No. CV09-
 18 2260-PHX-JAT, 2010 WL 3239387, at *2 (D. Ariz. Aug. 16, 2010) (same). A proposed
 19 amendment is futile if it would fail to survive a challenge of legal sufficiency under Fed. R. Civ.
 20 P. 12(b)(6). *Nordyke v. King*, 644 F.3d 776, 788 n.12 (9th Cir. 2011) (citing *Miller v. Rykoff-*
 21 *Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)).

22 DISCUSSION

23 In this case, the FAC still relies on MERS-based allegations. (*See generally* FAC (#63-
 24 1)). For this reason, the Court denies the motion to amend based on lack of jurisdiction.
 25 Although MERS is not listed as a defendant in the FAC, the JPML Court retained jurisdiction
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27 ² Ms. Olmos and Plaintiffs are both Nevada Resident. (Opp'n Mot. to Amend (#73) at
 28 8).

1 over all claims that relate to the formation and operation of MERS, "no matter how framed."
2 (Remand Order (#61) at 3). The requested amendments involve the operation of MERS
3 because MERS was listed as the beneficiary on the First Deed of Trust and executed the
4 substitution of trustee at issue in this case. (See First Deed of Trust (#66) at 35; Substitution
5 of Trustee (#68-9) at 2). Therefore any adjudication by this Court of such claims may touch
6 on issues the JPML has left with Judge Teilborg and potentially result in conflicting rulings.
7 Plaintiff must address his request for amendment to Judge Teilborg in the first instance. If
8 Judge Teilborg is satisfied that the remanded causes of action, as amended, would not touch
9 upon issues the JPML has left with him should this Court grant amendment, this Court may
10 then have jurisdiction to rule on such motions to amend. Alternately, if Judge Teilborg rules
11 directly on the motions to amend, this Court may then entertain any new causes of action
12 Judge Teilborg remands. In other words, all new claims, like all original claims, must be
13 examined for jurisdiction by Judge Teilborg in the first instance. Accordingly, the Court denies
14 Plaintiffs' Motion to Amend (#72).

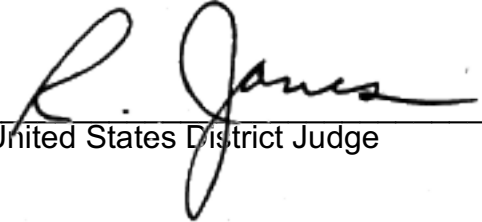
15 Because Plaintiffs' Motion to Amend must first be addressed by the JPML court, this
16 Court must also deny Defendant's Motion to Dismiss the original Complaint (#65) pending a
17 decision by the JPML court on Plaintiffs' Motion to Amend.

18 CONCLUSION

19 For the foregoing reasons, it is ORDERED that Plaintiffs' Motion to Amend (#72) is
20 DENIED for lack of jurisdiction. Plaintiffs must bring the motion in Case No. 2:09-md-02119-
21 JAT in the District of Arizona.

22 IT IS FURTHER ORDERED that Defendants' Bank of America Corporation, N.A.,
23 Countrywide Bank, N.A., Countrywide Home Loans, Inc., and Recontrust Company, N.A
24 Motion to Dismiss the remaining causes of actions under the original Complaint (#65) is
25 DENIED pending a decision by the JPML court on Plaintiffs' Motion to Amend.

1 DATED: This 7th day of October, 2011.

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4 United States District Judge
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